IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76- 1690

DR. H. W. BERRY, et al.,

Appellants,

v.

J. D. DOLES, etc., et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

Of Counsel:

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-

DR. H.W. BERRY, M.C. BLOUNT, ISAAC J. CHUMBLY and JULIAN C. SIMMONS, individually and on behalf of all those similarly situated,

Appellants,

v.

J.D. DOLES, individually and in his capacity as Chairman of the Peach County Board of Commissioners of Roads and Revenues; H.W. PEAVY, JR. and EDWARD C. WOODWARD, individually and in their capacity as members of the Peach County Board of Commissioners of Roads and Revenues; and JULIAN F. JONES, individually and in his capacity as Judge of the Probate Court of Peach County,

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from the order of the United States District Court for the Middle District of Georgia, entered February 28, 1977, which order by a court of three judges denied appellants' request for an injunction setting aside elections. Appellants also appeal from the order entered on April 26, 1977, refusing to reconsider or modify the initial order.

OPINIONS BELOW

The opinions of the United States District Court for the Middle District of Georgia, dated February 28, 1977, and April 26, 1977, are unreported and are appended hereto at 1a and 5a, respectively. The letter of the originating judge dated August 9, 1976, denying a pre-election hearing is appended hereto at 7a. Notices of appeal from the opinions, filed March 30, 1977 and May 25, 1977, are appended hereto at 9a and 11a, respectively.

JURISDICTION

This action was brought under the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and the following provisions of the United States Code: 28 U.S.C. §§1331, 1343(3) and (4), 2201, 2281 and 2284 and 42 U.S.C. §§1973c and 1983.

Plaintiffs filed this class action on August 6, 1976, to enforce §5 of the Voting Rights Act of 1965 in the elections to be held for the members of the Peach County, Georgia, Board of Commissioners of Roads and Revenues [hereinafter Board of Commissioners].[1]

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1. Plaintiffs also sought declaratory and injunctive relief against the use of at-large elections for the Board of Commissioners. This issue is for a single judge court and is presently pending.

A statutory three-judge district court was convened after the disputed elections were held which granted prospective relief on February 28, 1977, but refused to shorten terms or set aside elections held in violation of §5.

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and 42 U.S.C. §1973c. See Allen v. State Board of Elections, 393 U.S. 544 (1969).

STATUTORY PROVISIONS INVOLVED

This appeal presents a question as to the relief to be entered when a state statute was held unenforceable for non-compliance with the Voting Rights Act. The validity of the state statute is not at issue. However, for clarity, the statute Ga.L. 1968, p. 2473, §2A, and its predecessor, Ga.L. 1964, p. 2627, §1, are set out at 12a.

QUESTIONS PRESENTED

I. Whether the district court erred in refusing to shorten terms or set aside elections to remedy a patent violation of §5 of the Voting Rights Act of 1965?

II. Whether the district court erred in denying retroactive relief for a §5 violation on grounds that the change (staggering of terms) had no racially discriminatory purpose or effect without taking evidence on the issue, and contrary to allegations in the complaint?

STATEMENT OF THE CASE

This case involves the scope of relief for a violation of §5 of the Voting Rights Act of 1965. Plaintiffs sought, among other things, declaratory and injunctive relief against the holding of the August 10, 1976, primary election and the November 2, 1976, general election for the Peach County Board of Commissioners under §2A of Ga.L. 1968, p. 2473. The grounds for injunctive relief were that §2A of Ga.L. 1968, p. 2473, which staggered the terms of office for the Board of Commissioners constituted a change in voting standards, practices and procedures for which no judicial or administrative approval had been obtained as required by 42 U.S.C. §1973c.

In a letter to counsel dated August 9, 1976, the originating judge refused to set plaintiffs' motion for preliminary injunction down for hearing because he "seriously question[ed] that there is any possibility that the 1968 law which merely staggered the terms of the Peach County Commissioners is argueably a change encompassed by the Voting Rights Act." 7a. In their answer, defendants denied that the 1968 law constituted a change under the Voting Rights Act of 1965, but admitted that there had been no compliance with §5 procedures (defendants' answer, ¶10).

The August 10, 1976, primary elections were held utilizing the staggered terms provision, after which plaintiffs renewed their motion for injunctive relief requesting that the results be set aside and that new elections be held without regard to the 1968 law or under the 1968 law after pre-clearance was obtained. (Renewal of motion for injunctive relief and supplemental memorandum in support of motion for injunctive relief, p. 6.) The court failed to act upon the renewal of the motion and the November 2, 1976, general elections were held, once again utilizing the staggered terms provision.

On February 2, 1977, defendants filed a brief conceding for the first time that the staggering of terms was a change covered by §1973c requiring judicial or administrative approval prior to use. However, defendants argued that the setting aside of the 1976 election results was not required and that a prospective injunction against future elections under §2A of Ga.L. 1968, p. 2473, was the appropriate relief. On February 28, 1977, a three-judge court enjoined the prospective enforcement of the 1968 law but refused to set aside the 1976 election results. Without an evidentiary hearing on the issue, the court reasoned that there was an apparent lack of discriminatory purpose or effect in the use of the 1968 law and relying on Allen v. State Board of Elections, 393 U.S. 544, 572 (1969), refused to grant retroactive relief. 2a - 4a.

On March 23, 1977, plaintiffs moved pursuant to Rule 60(b)(6), F.R.Civ.P. for reconsideration or modification of the district court's February 28 order.[1] The motion was denied on the grounds that the court was without jurisdiction because of the pending appeal to this Court and there was no reason for reconsideration. 5a.

1. In the event that the court declined to set aside the elections, plaintiffs requested that it modify its order to require that defendants obtain preclearance under §1973c for the 1968 law thirty days prior to the final qualifying date for candidates in the 1978 election. Further, if defendants were unsuccessful in obtaining preclearance that all three Board of Commissioner posts be open in the 1978 election. Such an order would insure the unstaggering of the terms within a reasonable period of time and not on the eve of the 1978 election.

THE QUESTIONS ARE SUBSTANTIAL

I. The lower court misapplied applicable decisions of this Court.

The district court relied upon Allen v. State Board of Elections, 393 U.S. 544 (1969) in refusing to shorten terms or set aside elections held in violation of §5 of the Voting Rights Act of 1965. Allen was the first case in which this Court construed authoritatively the scope of coverage of §5. Allen held that any change in voting standards, practices or procedures is within the reach of §1973c. Also see, Perkins v. Matthews, 400 U.S. 379 (1971). But because the elections challenged in Allen were held in 1966 on the heels of passage of the Voting Rights Act, and at a time when no decision existed authoritatively delimiting §5, this Court refused to grant retroactive relief. Noting that "[t]hese §5 coverage questions involve complex issues of first impression", Allen v. State Board, supra, 393 U.S. at 572, the Court declined to set aside in 1969 the elections held in 1966. The circumstances in this case, however, manifestly are different from those in Allen.

The elections challenged here were held over seven years after the authoritative construction in Allen that any change in voting laws requires preclearance. The coverage of §1973c was certainly no longer an issue of first impression at the time of the 1976 elections in Peach County. The district court's reliance upon Allen to deny relief to appellants is misplaced.

In Perkins v. Matthews, supra, the Court stated that upon a finding of a §5 violation, the question of appropriate post-election relief is for the district court to decide. Factors to be considered include the nature of the change and whether it was reasonably clear at the time of the election the change was covered by §1973c, id. 400 U.S. at 396. The change in this case, the staggering of terms, unquestionably has a substantial impact on elections.[1] Secondly, even if appellees were unaware of Allen and Perkins prior to the 1976 primary election, they cannot claim that it was unclear whether the change was covered by §1973c at the time of the November, 1976, general election. See supplemental memorandum in support of injunctive relief and attachments 1 through 5 filed September 1, 1976, documents which unquestionably demonstrated that the Attorney General of the United States viewed the staggering of terms a change within the provisions of §5.

1. The staggering of terms has an obvious potential for diluting minority voting strength in jurisdictions such as Peach County which have a history of discrimination in registration and voting and in which race remains a dominant factor in the electoral process. In such jurisdictions white voters might be more likely to vote for a black candidate if he or she is one of three chandidates than if the black candidate is running for the only position open.

The equitable considerations discussed in Perkins favor the appellants. The lower court misapplied Allen and abused its discretion in refusing to shorten terms or set aside the 1976 elections.[1]

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1. Had the originating judge correctly analyzed the applicable law, he would have been obliged to enjoin the use of the unapproved election law change. See, Georgia v. United States, 411 U.S. 526, 541 (1973). To deny retroactive relief on the basis that the appropriate post-election relief is within the discretionary power of the district court would deny appellants a remedy solely because the lower court erred. Such a result is arbitrary and inequitable.

II. This case involves important issues concerning the scope of remedy for violations of §5 of the Voting Rights Act of 1965, and implementation of congressional and constitutional policy in favor of equal access to the political process.

The lower court's refusal to shorten terms or set aside elections defeats the purpose of §5, particularly in a case such as this where the failure to comply with §5 was patent. Section 5 "automatically suspends the operation of voting regulations enacted after November 1, 1964." South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966), and is to be given "the broadest possible scope." Allen v. State Board of Elections, 393 U.S. 544, 567 (1969). But here, the "suspended regulation" was not only implemented but the court refused to undo the harm done by the §5 violation. To that extent the court undermined the constitution and congressional purpose in enacting the Voting Rights Act of 1965.

Not only does "[f]ailure of the affected governments to comply with the statutory requirement ... nullify the entire [§5] scheme." Perkins v. Matthews, 400 U.S. 379, 396 (1971), but condoning such failures actually encourages §5 violations. Officials who wish to change their voting procedures but do not wish to comply with §1973c will be advised not to seek preclearance in hopes that no one will demand submission. If,

however, the change is challenged prior to an election, the officials, upon the logic of the decision of the lower court in this case, may continue to hold elections under the change until enjoined from doing so. Even if prospective relief is granted, the results of elections held under unenforceable voting laws may be retained. Recalcitrant officials have everything to gain and nothing to lose by failing to comply with §1973c. The failure of the lower court to grant proper relief in this case cannot be squared with congressional purpose in enacting the Voting Rights Act of 1965.

III. This Court should give plenary consideration to the jurisdiction of a court of three judges which has determined that a violation of the Voting Rights Act has occurred to consider racial discrimination, or lack thereof, in fashioning relief.

Appellants alleged that the staggering of terms denied their rights guaranteed by §1973c and the Thirteenth, Fourteenth and Fifteenth Amendments. No opportunity to introduce evidence on this allegations was allowed, but the district court relied on the lack of evidence to deny retroactive relief. 2a-4a.

This Court has repeatedly held that the authority of a local district court in a §5 action is limited to determining whether a voting requirement is covered by the Act, Allen v. State Board of Elections, supra, 393 U.S. at 570; Perkins v. Matthews, supra, 400 U.S. at 385; United States v. Board of Supervisors of Warren County, ___ U.S. ___, 97 S.Ct. 833, 835 (1977), and that it may not decide whether a statute violated the Fifteenth Amendment in its decision on the existence of a §5 violation. This Court in Allen did rely on the fact that no court had determined the discriminatory purpose or effect of the challenged statutes in limiting its relief to prospective application. But it is clear that district courts are not limited to freezing the status quo at the time of their orders, but may grant what is in

effect retroactive relief. United States v. County Commission of Hale County, Alabama, 425 F.Supp. 433 (S.D. Ala. 1976)(three-judge court), aff'd., ___ U.S. ___, 97 S.Ct. 1540 (1977).

If racially discriminatory purpose or effect is a relevant and legitimate issue in extending or limiting relief, this Court should consider whether plaintiffs seeking to enforce §5 are entitled to prove their claim that it exists.

IV. The district court abused its discretion in denying appellants' motion to shorten the terms of the two commissioners elected in 1976.

Under the statute held to be unenforceable by the district court, two members of the board of commissioners were elected in 1976 and one is to be elected in 1978. The prior statute would have required that all three members be elected in 1976. The two elected in 1976 are to serve until January 1, 1981.

In its February 28th order, the district court did not address the issue of which posts will be elected in 1978.[1] Appellants moved, in their March 23, 1977, motion for reconsideration to have all three posts filled in the 1978 elections if preclearance under §5 was not forthcoming, rather than the one post currently scheduled. Granting of this motion would have insured the unstaggering of terms required by the district court's order within two years rather than four. In denying the

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1. It is not at all clear that the commissioner elected in 1974 will be required to stand for election in 1978 or whether he will be allowed to serve until his successor is qualified under the 1964 statute. If the latter, he will have his term extended to six years.

motion in its order of April 26, 1977, the district court allows the appellees to have the benefits of their violation of the Voting Rights Act from 1968 until the elections in 1980. This Court should consider whether the delaying of relief for an additional two years constitutes an abuse of discretion. Compare, United States v. County Commission of Hale County, Alabama, 425 F.Supp. 433, 436-37 (S.D. Ala. 1976)(three-judge court), aff'd., ___ U.S. ___, 97 S.Ct. 1540 (1977).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Of Counsel:
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Neil Bradley
Christopher Coates
Atlanta, Georgia

Attorneys for Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DR. H.W. BERRY, ET AL.,	:	[Filed Feb 28, 1977]
Plaintiffs,	:	
-v-	:	CIVIL ACTION NO. 76-139-MAC
J.D. DOLES, Individually and in his capacity as Chairman of the Peach County Board of Commissioners of Roads and Revenues, et al.,	:	
Defendants.	:	

Before HILL, Circuit Judge; BOOTLE, Senior District Judge; and OWENS, District Judge.

OWENS, District Judge:

It appearing that no factual issues essential to determination of the issues properly before this three-judge court are in dispute, and the court having carefully read and considered the facts of this case and the legal arguments of the parties with respect to the issues,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants, their officers, agents, servants, employees, and attorneys, and all persons in active concert with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined from further using and enforcing in any respect so much of [1968] Ga. Laws 2627, et seq., which relates to the election of the Peach County Board of Commissioners unless and until the provisions of section five of the Voting Rights Act of 1965, as amended, 42 U.S.C.A. § 1973c, have been complied with. This injunction shall continue until those requirements have been complied with and shall not otherwise be dissolved.

The plaintiffs have requested that this court set aside elections held in 1976 pursuant to the subject 1968 law and order new ones. Given the rather technical changes

made in the county's election law by the 1968 amendment and, more important, the apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections, the court denies this request and will give this order only prospective relief. As stated in Allen v. State Board of Elections, 393 U.S. 544, 571-72, 89 S.Ct. 817, 22 L. Ed 2d 1, 20-21 (1969), with respect to laws of considerably greater impact on voting rights passed at about the same time as the law in question here:

> "We decline to take corrective action of such consequence [setting aside elections], however. These § 5 questions involve complex issues of first impression -- issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of

these statutes, if any, has not been determined by any court. We give only prospective effect to our decision...."

This three-judge court, having finally resolved the issues properly before it, does hereby dissolve itself and remand the case to the originating judge for such other and further proceedings consistent with this opinion as may be required.

SO ORDERED, this the 17 day of February, 1977.

s/ James C. Hill
James C. Hill
United States Circuit Judge

s/ W.A. Bootle
W.A. Bootle
Senior United States District Judge

s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed April 26, 1977]

DR. H.W. BERRY, et al.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO. 76-139-MAC
v.	:	
	:	
J.D. DOLES, Individually and in his capacity as Chairman of the Peach County Board of Commissioners of Roads and Revenues, et al.,	:	
	:	
Defendants.	:	

Before HILL, Circuit Judge; BOOTLE, Senior District Judge; and OWENS, District Judge.

OWENS, District Judge:

This case having been appealed to the United States Supreme Court, this court is without jurisdiction to consider the plaintiff's motion for reconsideration and, in any event, sees no reason for doing so.

The problem of relief is a question for a single-judge court.

SO ORDERED, this 26th day of April, 1977.

s/ James C. Hill
James C. Hill
United States Circuit Judge

s/ W.A. Bootle
W.A. Bootle
Senior United States District Judge

s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
Middle District of Georgia
Macon, Georgia 31202

August 9, 1976

Mr. Laughlin McDonald
52 Fairlie Street, N.W.
Atlanta, Georgia 30303

Dear Mr. McDonald:

On August 6 you filed a complaint in behalf of Dr. H. W. Berry and others against J. G. Doles and others, individually and as members of the Peach County Board of Commissioners. In connection with that complaint you have moved for a preliminary injunction.

I have read your complaint, your motion and your brief. I seriously question that there is any possibility that the 1968 law which merely staggered the terms of the Peach County Commissioners is arguably a change encompassed by the Voting Rights Act. Until such time as you can demonstrate by brief that it is a question that is encompassed by the Voting Rights Act, I will refrain from setting your motion down for a hearing.

I assume you have made arrangements for your complaint to be served. At such time as it has been served and responsive pleadings have been filed, the court will consider

your motion for a preliminary injunction and for the creation of a three judge court on briefs and affidavits in the usual fashion.

Very truly yours,

s/ Wilbur D. Owens, Jr.
United States Judge

cc: Mr. Sampson M. Culpepper

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed Mar. 30, 1977]

DR. H.W. BERRY, et al.,

Plaintiffs,

V.

Civil Action
No. 76-139-Mac

J.D. DOLES, et al.,

Defendants.

MOTION OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Plaintiffs herein appeal to the Supreme Court of the United States from the order entered in this action on February 28, 1977 which order denied the Plaintiffs an injunction setting aside elections.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Respectfully submitted

Laughlin McDonald

s/ Neil Bradley
Neil Bradley
52 Fairlee Street, N.W.
Atlanta, Georgia 30303

s/ M. Linda Mabry
M. Linda Mabry
504 American Federal Bldg.
Macon, Georgia 31201
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DR. H.W. BERRY, et al., Plaintiffs,	)	[Filed May 25, 1977]
v.	)	Civil Action No. 76-139-MAC
J.D. DOLES, etc., et al., Defendants.	)	

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that plaintiffs herein appeal to the Supreme Court of the United States from the order entered in this action on April 26, 1977, which order denied plaintiffs' motion for reconsideration of the court's order of February 28, 1977.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

s/ Laughlin McDonald
Laughlin McDonald
Neil Bradley
52 Fairlie Street, NW
Atlanta, Georgia 30303
Counsel for Plaintiffs

Ga.L. 1968, p. 2473

Section 2A. At the general election conducted in 1968, that candidate elected to post No. 3 (county at large) to take office on January 1, 1969, shall be elected for a two-year term of office instead of a four-year term. He shall serve until December 31, 1970. In the general election of 1970, his successor shall be elected to a four-year term of office and every four years thereafter a successor shall be elected in the general election in which the respective term of office shall expire to serve for a four-year term of office.

Ga.L. 1964, p. 2627

Section 1. There is hereby created a board of commissioners of roads and revenues for Peach County to be composed of three (3) members. One member shall be a resident of the City of Fort Valley, one member shall be a resident of Peach County outside the City of Fort Valley, and one member shall be from the county at large. The aforesaid offices shall be designated as posts numbers 1, 2 and 3, respectively. The members shall be elected by the voters of the entire county.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1690

DR. H. W. [redacted], et al.,

Appellants,

v.

[redacted], etc., et al.,

Appellees.

[redacted]
[redacted]
[redacted]
[redacted]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1690

DR. H. W. BERRY, M. C. BLOUNT, ISAAC J. CHUMBLY and JULIAN C. SIMMONS, individually and on behalf of all those similarly situated,

Appellants

v.

J. D. DOLES, individually and in his capacity as Chairman of the Peach County Board of Commissioners of Roads and Revenues; H. W. PEAVY, JR. and EDWARD C. WOODWARD, individually and in their capacity as members of the Peach County Board of Commissioners of Roads and Revenues; and JULIAN F. JONES, individually and in his capacity as Judge of the Probate Court of Peach County,

Appellees

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the following grounds:

1. The decision of the District Court is so obviously correct under the principles established in Beer v. United States, 425 U.S. 130 (1976), as to warrant no further review by this Court.

2. The District Court did not abuse its discretion in failing to set aside the elections held in 1976 or shorten the terms of the County Commissioners.

OPINION BELOW

The opinion and order of the District Court are set forth in the Appendix of appellants' jurisdictional statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement.

QUESTION PRESENTED

Whether the three-Judge District Court erred in refusing to grant an injunction whereby the elections conducted in 1976 would be set aside and the terms of the persons elected shortened to two years.

STATUTES INVOLVED

Pertinent portions of the Act of the General Assembly of Georgia creating the Board of Commissioners of Peach County and the amendment thereto are set forth in the Appendix of appellants' jurisdictional statement.

STATEMENT

Appellees do not take issue with the statement of the case as set forth in appellants' jurisdictional statement.

ARGUMENT

I.

Prior to 1964, Peach County, Georgia was governed by one commissioner who held this position by virtue of having been elected Judge of the Court of Ordinary. Ga. Laws, 1939, p. 703.

In 1964, the General Assembly of Georgia passed another local act dealing with Peach County which created a three-man commission to govern county affairs. This Act provides for three commissioners who must live in districts but who are elected on a county-wide basis for four-year terms. The Act was conditioned on a referendum which was approved on April 29, 1964, and the first elections under this Act were held in 1964. Section 13 of this Act specifically repealed the 1939 legislation.

Thereafter in 1968 the General Assembly enacted another bill dealing with Peach County which inserted a new Section 2A in the 1964 Act. This amendment provided that the candidate elected to Post 3 would serve a two-year term instead of the usual four years, and that thereafter his successor would be elected to a four-year term of office. The amendment thus had the effect of providing continuity of board membership by staggering the terms of the three commissioners.

In the District Court appellees conceded that the 1968 amendment was subject to Section 5 of the Voting Rights Act of 1965 and that it could not be used in any future elections unless and until it is cleared under one of the procedures provided by the Act.

As to the question of any further relief, appellants have requested at various stages of the case that the 1976 elections be enjoined, that the elections be set aside, and that the terms of the two commissioners elected in 1976 be shortened to two years. The District Court correctly refused any such relief.

Posts 1 and 2 which were created by the 1964 Act of the General Assembly pre-date the Voting Rights Act of 1965 and were not mentioned, re-enacted or affected in any manner whatsoever by the 1968 Amendment. These posts are therefore carried forward without the necessity of being subjected to the pre-clearance requirements of the Voting

Rights Act. Beer v. United States, 425 U.S. 130 (1976); Pitts v. Cates, 536 F.2d 56 (5 Cir. 1976). Only Posts 1 and 2 were open for contest in the 1976 elections which appellants seek to have set aside. There was no contested election for Post 3 in the August and November elections of 1976. Therefore, there was no election to enjoin, and likewise there is no election which could subsequently be set aside.

II.

Even assuming that the District Court had the power to enjoin or set aside the 1976 elections, it did not abuse its discretion in refusing to do so.

This Court has addressed the question of relief in a Section 5 case in Allen v. State Board of Elections, 393 U.S. 544 (1969), and Perkins v. Matthews, 400 U.S. 379 (1971), and has established several factors which should be considered by the lower courts in determining the appropriate remedy:

a. Was the change so clearly covered by § 5 that the failure to submit it constituted deliberate defiance of the Act? Allen, 393 U.S. at 572.

b. The nature of the changes complained of. Perkins, 400 U.S. at 396.

c. Has a discriminatory purpose or effect been determined by any court? Allen, 398 U.S. at 572.

d. Was it reasonably clear at the time of the election that the changes were covered by § 5? Perkins, 400 U.S. at 396.

When considered in light of these factors, the balance of the equities clearly lies in appellees' favor.

The 1968 Amendment effected a technical change in the county's election law to provide for continuity of board membership. Although this Court has clearly established in Allen and subsequent cases that the district court cannot consider whether the change is potentially discriminatory, it has just as clearly said that the "nature of the change" should be considered, thereby implying that some changes may be more significant than others. This case deals with the tenuous proposition that votes were diluted because the terms of the three commissioners were staggered and not with such things as the right of Negro citizens to be candidates, Hadnott v. Amos, 394 U.S. 358 (1969), or irregularities on election day which restrict the right to cast a ballot, Bell v. Southwell, 376 F.2d 659 (5 Cir. 1967).

There has been no finding or determination the District Court that the change in issue has any discriminatory purpose or effect. Moreover, this change is only one small part of this case when viewed in its overall context. Count I of the Complaint which is still pending before the District Court is a frontal attack on all facets of the county's election law based on the theory that at-large elections dilute the potential voting strength of minorities.

The change in question here was enacted in 1968 prior to this Court's decisions in Allen and Perkins. It was used in the elections of 1968, 1970 and 1974 without objection or question from any quarter. This suit was filed four days before the primary held on August 10, 1976. Appellants contend that it was reasonably clear in 1976 that this change was covered; however, no court as of yet has so held as they admitted in their briefs filed below. Even assuming a reasonable person familiar with this Court's decisions construing the provisions of the Voting Rights Act might have suspected it would be covered, there is no evidence of any deliberate defiance.

What is reasonably clear in this case, however, is that the appellants have not been diligent. In reality they are asking this Court to order the District Court to set aside an election conducted in 1974 pursuant to a statute enacted in 1968 by means of a lawsuit filed four days before the primary in 1976. Appellees are not aware of any cases which have sanctioned such a radical result.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court.

Respectfully submitted,

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SAMPSON M. CULPEPPER

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Georgia 31030

Attorneys for Appellees

No. 76-1690

In the Supreme Court of the United States

OCTOBER TERM, 1977

H. W. BERRY, ET AL., APPELLANTS

v.

J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

FRANK D. ALLEN, JR.,
MARK L. GROSS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1690

H. W. BERRY, ET AL., APPELLANTS

v.

J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the invitation of the Court, dated October 3, 1977.

QUESTION PRESENTED

Whether after determining that Peach County, Georgia, unlawfully effectuated a voting change which had not been precleared under Section 5 of the Voting Rights Act of 1965, the district court should have required immediate compliance with Section 5.

STATEMENT

On March 10, 1964, the State of Georgia enacted a local statute providing for a three-member Board of Commissioners of Roads and Revenue to govern Peach County, Georgia. The three members were assigned numbered posts. Post Number 1 was reserved for a resident of the City of Fort Valley; Post Number 2, for a resident of the County from outside the city; and Post Number 3 was to be elected at-large. All three posts were to be filled for four-year terms beginning at the general election of 1964. Georgia Laws, 1964, §1, p. 2627 (J.S. App. 12a).

The following year Congress enacted the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. 1973 *et seq.* Section 5 thereof (42 U.S.C. 1973c) bars states and political subdivisions covered by the Act from effectuating a change in voting procedures in effect on November 1, 1964, unless a three-judge panel of the United States District Court for the District of Columbia, in a declaratory judgment suit by the covered jurisdiction, has determined that the change does not have a racially discriminatory purpose or effect. In the alternative, the jurisdiction may submit the change to the Attorney General of the United States, and effectuate it if he does not interpose an objection within sixty days. 42 U.S.C. (Supp. V) 1973c. The State of Georgia and Peach County are covered jurisdictions. 30 Fed. Reg. 9897.

In 1968, Ceorgia adopted another local statute that changed the procedure for electing the Board of Commissioners in Peach County. In order to stagger the members' terms, the at-large member holding Post Number 3 was to be elected to a two-year term in 1968, and to a four-year term at subsequent elections. Georgia Laws, 1968, §2A, p. 2473 (J.S. App. 12a).

The change has never been submitted for preclearance under Section 5 either to the United States District Court for the District of Columbia or to the Attorney General. Nevertheless, it was effectuated in 1968 and 1970. As a result, instead of a single election for all three posts, elections of candidates for the city and non-city posts (Nos. 1 and 2) have been held at four-year intervals since 1968, while election of candidates for the at-large post (No. 3) have been held at four-year intervals since 1970. The last election for posts 1 and 2 was conducted in 1976, and for post 3 in 1974. The next election for post 3 will be conducted in 1978, and for posts 1 and 2 in 1980.

On August 6, 1976, four days prior to the scheduled August 10, 1976, primary for posts 1 and 2, the appellants filed this action. They requested a declaratory judgment and an injunction to restrain the election of Board members at the August 10, 1976, primary election and the scheduled November 2, 1976, general election. The complaint alleged that the 1968 Act was a change which should have been, but was not, precleared under Section 5 of the Voting Rights Act prior to its implementation (J.S. 5).

On August 9, 1976, the district court wrote to appellants' counsel, indicating that until it was demonstrated that the 1968 law was a "change," it would not set the case for hearing (J.S. App. 7a, 8a). The primary election was held as scheduled on August 10. The appellants then filed a motion renewing their request for relief and requesting the court to set aside the results of the primary election (J.S. 6). There was no response from the court, and the general election was held as scheduled on November 2, 1976 (*ibid.*).

Appellees subsequently conceded that the 1968 Act was subject to Section 5 of the Voting Rights Act (J.S. 6). On

February 28, 1977, without holding a hearing, the district court enjoined future enforcement of the 1968 Act until it has been precleared under Section 5 (J.S. App. 2a). The court refused, however, to set aside the 1976 elections, on the grounds that the changes effected by the 1968 Act were "rather technical," and that there was an "apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections" (J.S. App. 3a).

On March 23, 1977, appellants moved for reconsideration or modification of the order, asking the court to require the appellees to secure preclearance in time to qualify candidates for the 1978 election, or, if preclearance was not secured, to require that a simultaneous election for all three posts be conducted in 1978 (J.S. 7). On March 30, 1977, appellants filed their notice of appeal to this Court from the district court's February 28 order (J.S. App. 9a). On April 26, 1977, the district court denied appellants' motion for reconsideration, holding that the intervening filing of the notice of appeal deprived the court of jurisdiction. Appellants noticed an appeal to this Court from that order on May 25, 1977 (J.S. App. 11a).

ARGUMENT

1. In this case, the district court held that the 1968 Act staggering the elections of board members was a voting change subject to the preclearance requirements of Section 5 (J.S. App. 2a). The appellees do not dispute this holding (Motion to Affirm, p. 4). Nor do they dispute the finding, implicit in the district court's order, that the county has never obtained the clearance required by law. Rather, they appear to contend that the 1976 election was not affected by the 1968 change because it involved only posts 1 and 2, for which the date of the election and the term of office were the same as under the pre-1968 procedure (Motion to Affirm, pp. 3-5).

The district court, however, did not hold that there had been no change in voting procedures affecting the 1976 elections. On the contrary, it is evident that the 1976 election was affected. Prior to the change, all three board members had stood for election at the same time. The term for post 3 was staggered in 1968, thus providing that the election to that post would not occur at the same time as the election to the other two posts.[1] Electing two members to join a third who is not up for election is different than electing all three members simultaneously, because the number and combinations of possible choices the electorate must consider is changed.[2]

The 1968 Act thus changed the method of electing the entire board; accordingly, all board elections held after the implementation of the 1968 Act were in violation of

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[1]The election for posts 1 and 2 is not like the election for the at-large seats in *Beer* v. *United States*, 425 U.S. 130. In that case the submitted change was a redistricting of the five single-member district seats on the New Orleans City Council. The redistricting of those five seats left totally unaffected the method of electing the two at-large seats, and made no change in the manner of conducting the election of the council. All seven seats, as before, would be elected at one election. The at-large seats were held to be unaffected, for purposes of Section 5, by the redistricting of the other five seats. Here, the 1968 Act affected the mode of electing the entire board.

[2]In areas where racial bloc voting is prevalent, staggering elections can in some circumstances have a tendency to isolate election contests in which a black candidate is running against a white candidate. If there is a white majority in the electorate, the staggering of the election could have a detrimental impact on black candidates. When Congress was considering the second extension of the Voting Rights Act in 1975, the Department of Justice submitted a list of all Section 5 objections theretofore. Of 168 objections, eleven were based, in whole or in part, on staggered terms. See Exhibits to testimony of Assistant Attorney General Pottinger, Hearings on S.407, S.903, S.1297, S.1409 and S.1443 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., pp. 598-600 (1975).

Section 5. *Reine* v. *Town of Sorrento*, M.D. La., No. 73-120, decided April 18, 1975, affirmed, 425 U.S. 946; *United States* v. *County Commission, Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala.), affirmed, 430 U.S. 924; *United States* v. *Garner*, 349 F. Supp. 1054 (N.D. Ga.).

Since the holding of the 1976 election pursuant to the 1968 Act thus necessarily would further effectuate the violation, the district court should have required the defendants promptly to comply with the requirements of Section 5. The relief entered by the court, however, not only fails to require prompt compliance, but permits the violation to continue.

The district court's order enjoined appellees "from furthering and enforcing in any respect [the 1968 change] * * * unless and until the provisions of section five * * * have been complied with" (J.S. App. 2a). But it did not direct any affirmative steps to achieve compliance. Since elections have been conducted under the non-cleared procedures since 1968, and the present incumbents were elected under the staggered procedures, the effects of the violation continue and will continue until the 1968 change is cleared, or the Commissioners' posts are subjected to the election procedures in effect on November 1, 1964, as contemplated by Section 5.

2. The district court declined to order new elections for three reasons: the "technical" nature of the violation; the decision in *Allen* v. *State Board of Elections*, 393 U.S. 544, refusing to order new elections despite a violation of Section 5; and the apparent absence of discriminatory purpose and effect (J.S. App. 2a-3a). But none of these considerations are dispositive as to the need for appropriate affirmative relief.

First, as we have shown (see J.S. 15-16), the violation significantly affected the election procedures for all three posts. Moreover, in *Allen* the Court held that Section 5 was " 'intended to reach any state enactment that altered the election law of a covered State in even a minor way.' " 393 U.S. at 566. Second, while the Court refused to set aside the election in that case, it did so only because, at the time that case was decided in 1969, the scope of Section 5's coverage presented a question of first impression, subject to "rational disagreement." 393 U.S. at 572. The Court therefore required only prospective relief. Subsequently, however, in *Perkins* v. *Matthews*, 400 U.S. 379, 395-396, the Court held that such reasoning was inapplicable to noncleared election procedures implemented two months after the decision in *Allen* was announced. Finally, it was inappropriate for the district court, in this Section 5 coverage case, to determine whether the 1968 change had a discriminatory purpose or effect. Congress expressly reserved that issue for consideration by the District Court for the District of Columbia or the Attorney General. *Connor* v. *Waller*, 421 U.S. 656; *Perkins*, *supra*, 400 U.S. at 385; *Allen*, *supra*, 393 U.S. at 555, 558-559.

3. Nevertheless, it does not follow, as appellants contend (J.S. 15-16), that, as a matter of initial relief, the 1976 elections should be set aside, or that the district court should "unstagger" the election procedure by ordering the simultaneous election of all three members in 1978. In *Perkins*, the Court held (400 U.S. at 396-397) that:

> In certain circumstances, for example, it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming.

We believe that this is such a case. The "staggering" of terms on a local governing body in a covered jurisdiction does not necessarily have a racially discriminatory effect; whether it does or not depends on the particular facts and circumstances (see note 2, *supra*, p. 5). And such legislation may be sincerely motivated by a purpose to provide continuity of knowledge and experience rather than a purpose to discriminate on account of race or color. These matters, however, can be determined only under one of the alternative clearance procedures of the Voting Rights Act, *i.e.*, by the District Court for the District of Columbia or the Attorney General. Accordingly, we submit that in this case, the district court should be directed to enter an order allowing the appellees a short specific time period—we suggest 30 days—within which to apply, by one procedure or the other, for clearance of the 1968 change under Section 5. If the change is cleared, no further action would be required. If it is not cleared, appellants should then be permitted to renew their request for election of all three members at the same time.

CONCLUSION

The Court should note probable jurisdiction, and dispose of the case summarily. It should affirm the judgment of the district court insofar as it found a violation of Section 5. It should reverse the judgment insofar as it denies all affirmative relief, and remand with directions that the district court allow appellees 30 days within which to apply for clearance of the 1968 change under Section 5, and thereafter enter such further orders

as are appropriate should appellees fail to act within that period or should the 1968 change not be cleared under Section 5.

Respectfully submitted.

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